

VIDEO TRANSCRIPT

Title: ShutterTalk Live Presents: How We Protect and Enforce Your Rights

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Speaker: Heidi Garfield, Assistant General Counsel for Intellectual Property and Litigation, Shutterstock, Inc.

Heidi Garfield (00:04):

Hi, and welcome to today's ShutterTalk. My name is Heidi Garfield and I'm assistant general counsel responsible for litigation and intellectual property matters here at Shutterstock. Today I'll be going over how Shutterstock and you can protect and enforce your rights in your content. While I hope that the information in today's ShutterTalk is useful for you, and it helps you understand Shutterstock's terms and policies, this is not -- this information is not meant to be legal advice. If you require further information, please consult your own attorney. If you have any questions during today's presentation, please put them into the comment box on the side of your screen, and we'll get to them at the end of the presentation.

Heidi Garfield (00:40):

So, what we'll be talking about in today's ShutterTalk.

Heidi Garfield (00:43):

Today's topic will cover first your rights in your content, next, Shutterstock's rights with respect to your content. And third, how we can work together to protect and enforce your rights in your content. First things first, it's your content, what are your rights? Your rights in your content are set forth in the Shutterstock submitter terms of service. The copyrights in all of your content remain with you, the copyright owner, and nothing in the terms of service is meant to transfer any rights to Shutterstock.

Heidi Garfield (01:14):

However, by submitting your content to Shutterstock, you do expressly waive your authorship -- your -- your artist authorship rights. What are those? Those refer to your right to control the eventual fate of your content, meaning how it's used. In order to license content from you, the content and all parts must be owned or controlled by you. They must be unencumbered, and they must be original works that are capable of copyright registration in the United States or any other country where that protection is available.

Heidi Garfield (01:46):

So now you might be wondering what is copyright? Copyright gives the author of a creative work the exclusive right to display, reproduce, distribute, and financially benefit from the work that you create. Copyright is any original work of authorship that is fixed in a tangible medium and may be protected by copyright. So what's original? For a work to be considered original, it has to be independently created by you, the author, and it has to have some degree of creativity.

Heidi Garfield (02:15):

So let's go -- few -- through a few examples to try to better understand exactly when a copyright can attach. A copyright cannot attach to a concept or an idea. However, a copyright can attach to original expression of that concept -- id -- or idea. What about an event? A copyright cannot attach to an event itself, but a -- a copyright can attach to an original work, for example, a photo depicting that event.

Heidi Garfield (02:40):

Next, a copyright cannot attach to a method or process, for example, cropping or editing. However, a copyright can attach to something that you create using that method or process. Let's discuss a little bit about the international scope of copyright protection that you might have.

Heidi Garfield (02:59):

Other countries may recognize the copyright to your work in your country to the same extent that country would recognize the copyright of the work for its own nationals, provided that both countries are signatories to the Berne Convention, which is an international treaty. It is important to know that this does not mean that your copyright is international, rather, it means that a signatory country will treat your copyright ownership the same as it would under its own laws.

Heidi Garfield (03:23):

Countries that are signatories to the Berne Convention are required to have certain enforcement procedures against intellectual property infringement. The agreement on trade related aspects of intellectual property rights, or more easily referred to as TRIPS outlines these provisions, and they include conservatory measures, civil remedies and criminal sanctions.

Heidi Garfield (03:47):

Copyright registration is an important part of owning a copyright and enforcing your rights in your copyright. In the US your copyright exists the second the work is created in a fixed form. However, copyright registration, while not required, has certain advantages and may be required in certain instances to enforce your rights. For US works, registration is necessary in order to bring a copyright infringement suit in court.

Heidi Garfield (04:09):

Next, creating a, attaching a registration to your copyright can create a public record of your work. You can then use it to prove copyright ownership if there's ever a dispute over your work. It may also be useful in preventing your work from being considered orphaned or abandoned. Your copyright registration can also establish evidence in court in the validity of your copyright.

Heidi Garfield (04:29):

And finally, in the event that you were to bring a copyright infringement claim, statutory damages and attorney's fees are only available for registered copyrights, as opposed to an award for actual damages and profits. For more information on how to register your copyright, you can visit the copyright office's website.

Heidi Garfield (04:46):

But very briefly, I can tell you that in order to register, you need to file an application through the copyright office by mail or through an online system, pay a non-refundable registration fee of \$65 for mail or \$35 for online, and then provide a deposit, which is a copy of your work with the copyright office in order to make your registration final. This can be a hard copy by mail or an upload for electronic filings.

Heidi Garfield (05:09):

So, you have a copyright, what do those rights actually entail for you? The rights in your copyright give you six essential rights, more or less, and I'll go through those in more detail. These are the right to reproduce your work, the right to create a derivative work, the right to distribute your work, the right to perform your work publicly, the right to display it publicly and the right to perform it publicly for a digital audio transmission.

Heidi Garfield (05:31):

Many of these are self explanatory. For example, the right to reproduce is the right, a reproduction is a copy of your original work. An example of this might include a scan of your original photo. The right to create a derivative work refers to a variation or transformation of a preexisting work. An example of this might be creating a sketch of an existing painting or creating a silhouette from a photograph.

Heidi Garfield (05:55):

The next right, the right to distribute, refers to the right to sell, transfer, rent, or lease your work. An example of this might be selling prints or posters of your photograph. The right to perform it publicly means in fact, the right to perform it before a public audience. An example of this might be performing a choreographed dance before an audience at a ticketed event.

Heidi Garfield (06:15):

The right to display your work publicly also refers to the right to display before a public audience. An example of this might be displaying your photo on a website such as Shutterstock. Last, the right to perform it publicly for a digital audio transmission refers to the right to perform a sound recording to a public audience. For example, playing a song on an internet radio service.

Heidi Garfield (06:36):

Other countries may recognize some or all of these rights or additional rights that are not contemplated by U.S. law. For more information, please visit the website for the local copyright office. We've established that you have rights in your content and what those rights might entail, now let's discuss what Shutterstock's rights are with respect to your content when you choose to license it through Shutterstock.

Heidi Garfield (06:59):

Remember that you give Shutterstock permission to reproduce, prepare derivative works incorporating, publicly display, market, sub-license and sell any content that is uploaded by you and accepted by Shutterstock. You retain all copyright ownership in your content, and you give Shutterstock licensing rights.

Heidi Garfield (07:17):

A license is an agreement where the copyright owner of the work agrees to let another party use the work for certain purposes. A license does not transfer the copyright, but it gives the licensee permission to use the content in specific ways. Copyright owner, you, may license the content for a fee, which is the royalty that you earn when you license content through an agency such as Shutterstock.

Heidi Garfield (07:38):

If you're using a licensor like Shutterstock, two things must happen in order to license your content to third parties. The first is that the licensor has to obtain your permission in order to license the work. For example, through the sub -- Shutterstock submitter terms of service. Second, the licensor then needs to license your content out according to an agreement that controls how a customer can use your content.

Heidi Garfield (08:01):

Remember that your Shutterstock content is licensed non exclusively. That means that you may upload your content to other stock agencies or websites for licensing. Your Shutterstock license also gives Shutterstock the right to market or advertise your content on social media platforms. When you license your content through Shutterstock or other stock licensing agencies, you earn a royalty on each unique download of your content by a customer.

Heidi Garfield (08:24):

Let's discuss these Shutterstock licenses in a little bit more detail. The two primary licenses available for your content would be the standard and enhanced license, and there are restrictions on both that create the primary differences between the two. The standard license limits the use of your content based on distribution and the project budget. The enhanced license permits the use of your content on merchandise for resale as well as unlimited distributions and higher budgets. We'll discuss these in more detail now.

Heidi Garfield (08:57):

There's a lot of information on this slide comparing the standard to the enhanced license. So I'll go through it in more detail with you. Under the standard license, the permitted use would be a digital reproduction, including on websites, in online advertising, social media, mobile advertising, mobile apps, software, e-cards, publications, and the like, in online media, or sharing services such as YouTube, Dailymotion or Vimeo. This use is permitted under both the standard and enhanced license, but note the first standard license, the image may not be used in a production with a budget exceeding \$10,000. Whereas under the enhanced license, the rights to use it in this way are unlimited.

Heidi Garfield (09:33):

The next potential use, which is available under both the standard and an enhanced license is to print your content in physical form, such as part of product packaging or labeling, letterhead and business cards, point of sale advertising, billboards, CD, and DVD cover art, or in the advertising and copy of me -- media such as magazines, newspapers, and books.

Heidi Garfield (09:52):

While this is available under both licenses, under a standard license, your image may not be used more, in more than 500,000 reproductions. Under an enhanced license, there's no limit with respect to the use of the content. The next covered use, which is available under both licenses is out of home advertising campaign. Under a standard license, your image may not be used in more than 500,000 reproductions, whereas under the enhanced license, again, there's no limit.

Heidi Garfield (10:18):

The next use, which is available under both the standard and enhanced license is to allow your image to be incorporated into film, video, TV series, advertisements, or other multimedia productions for distribution in any media -- in any medium. Under the standard license, your image may not be used in any production with a budget exceeding \$10,000. Whereas under the enhanced license, there's no limit.

Heidi Garfield (10:41):

The next available use is only permitted under the enhanced license. This use would permit incorporation of your image into merchandise or promotional items for sale or distribution, meaning as an example, but without limitation, textiles, artwork, magnets, wall art, calendars, toys, stationary, greeting cards, or any other physical reproduction for resale or distribution.

Heidi Garfield (11:04):

Under the enhanced license, although this is permitted, there are additional restrictions. Your content must be incorporated into, with material creative or functional elements apart from the image itself. This also includes print on demand. The next use which is permitted under both the standard and enhanced license refers to use for personal non-commercial use, uh, and not for distribution or commercial use of any kind.

Heidi Garfield (11:29):

While this is available under both the standard enhanced license, under the standard license, the use is limited to personal and noncommercial use. And under the enhanced license, the use would be, we might include purposes -- decorative purposes for commercial space owned by a customer or a customer's client, but not for sale. Finally, your content may be incorporated as elements of digital templates for sale or distribution only under an enhanced license. This use is not available under a standard license.

Heidi Garfield (12:00):

Now, for the more interesting use that you might be concerned with today, given the to -- the topic of today's ShutterTalk is prohibited uses. I'm going to go over these in detail as well, and give you some particular examples of each type. Prohibited uses under both licenses include something generally referred to as our sensitive uses. And I'll read this verbatim so that you can hear it fully in case you can't see this slide.

Heidi Garfield (12:25):

This includes use in a way that portrays any person, a model, depicted in a way that a reasonable person would find offensive, including in connection with pornography, adult videos, adult entertainment venues, escort services, dating services, in connection with the advertisement or promotion of tobacco products, as endorsing a political party, candidate, elected official or opinion, as suffering from or medicating for a physical or mental ailment or engaging in immoral or criminal activities.

Heidi Garfield (12:53):

Some of the most common examples that we see of content being incorporated into these sensitive uses that are prohibited by both licenses might be use of an image in connection with a strip club or adult magazine. Another use, certainly one that's very current right

now, would be the incorporation of an image into a television advertisement for a political campaign.

Heidi Garfield (13:12):

The next use that we'll go over that is prohibited by both licenses is the use of your image in connection with any content that is pornographic, defamatory or deceptive, or in a manner that could be considered libelous, obscene or illegal. An example of this second category might be the use of content in connection with an article that is slanderous.

Heidi Garfield (13:31):

The next prohibited use is to resell, redistribute, provide access to, share or transfer any image except if specifically permitted under this license. An example of this type of prohibited use might be a customer making content available in a gallery for others to download such as a gallery that might be available to that customer's clients.

Heidi Garfield (13:53):

The next prohibited use is to use any content in a manner that infringes upon a third party's trademark, or other intellectual property rights, or in a manner that might give rise to a claim for unfair advertising or -- sorry, deceptive advertising or unfair competition. An example of this type of use might be for a customer to crop content so as to make a third party's trademark the focal point of the content, thereby infringing the, the trademark holder's rights when that content is used in a commercial context.

Heidi Garfield (14:21):

The next prohibited use is the use of any image, whether in whole or in - - in part as a trademark, a service mark, a logo or any other indication of origin. This category most commonly includes turning an image or a part of an image into a logo that is then sold to a, to a customer's clients. The last category of use, sorry, the next category of use is, that is prohibited is to u - - use content in any manner that rep, falsely represents that the content was created by the customer or somebody other than the, than the rights holder of that content.

Heidi Garfield (14:54):

This category might involve a user claiming that he or she created the content when in fact he didn't, you did. The last prohibited use is a use of any image on a social media platform or third party website that claims to acquire rights in the content. Now that we've talked about all of the different potential uses of your content, both prohibited and permissible under our licenses, let's talk more about how to monitor your content.

Heidi Garfield (15:21):

Licensing content in a digital marketplace opens up far more opportunities for your work than ever before. The obvious downside of course, is that when you disseminate more

copies of your work to licensing agencies, there's more risk of your content being misused, for example, without a license or in violation of your license. To monitor uses of your content, you can do reverse image searching. This allows you to find uses of your content on the internet through a reverse image search tool.

Heidi Garfield (15:48):

These tools compare a particular image that you provide to others on the internet and attempt to find visually similar content. Examples of reverse image tools include TinEye and Google Image search. These let you search for visually similar images. You can view the search results and see if your images are being used with permission and in accordance with any applicable licenses.

Heidi Garfield (16:12):

Let's discuss the most common types of misuse that we see for content, whether licensed or unlicensed through the Shutterstock licenses. Unauthorized use by someone who has not purchased a license to your work may be the most common use that we see. Examples of this might include use of a watermarked image.

Heidi Garfield (16:30):

Other signs that your content is being used without a license include a blur on the image where a watermark should be, very low resolution or poor quality version of your image or a version of your content which has been cropped so as to remove the watermark. Another example of misuse of your content, use without a license of your content is when somebody takes copyrightable elements of your work or your work in its entirety, and incorporates it into its own work without your permission, or without a license.

Heidi Garfield (16:59):

Another type of misuse that we see is use beyond the scope of an applicable license. This is where somebody has licensed the content through an agency such as Shutterstock or you directly but is using it beyond the scope of those terms. For example, if you know that you're licensing your content through Shutterstock and you've only had standard licensed downloads of your content but you see your image incorporated into merchandise for resale, it's possible that that use is beyond the scope of your license, of the license where, and an enhanced license should be put in place.

Heidi Garfield (17:33):

When your image is used without a license at all and you think you see versions of it incorporated to other content, you may be wondering how to determine whether or not it's been copied and if copyright infringement is actually occurring. You, remember from our earlier slides that you own the right in your expression of an idea, not the idea itself. Others may create a work with the same idea or theme, however, they may not copy your expression of the same idea.

Heidi Garfield (17:57):

So when is it infringement? Unfortunately, there's no magic formula for determining when infringement has occurred. But let's take a look at this example so that you can better understand what we might consider in assessing infringement. This is an example of two images that have the same idea, a pair of hands holding a globe. Although both images encompass a similar idea, the way that they express the image is sufficiently different from one another so as not to be considered infringement.

Heidi Garfield (18:22):

Consider differences in these two images, such as background colors, features of the hands, the colors of the globe, the pose of the hands and the overall composition of the images. Conversely, let's take a look at a couple of images where there might be copied elements that could potentially constitute copyright infringement. Here's an example where two images are too closely inspired by the other.

Heidi Garfield (18:44):

Although these two images have a different look overall, some elements, specifically the owls in each image are almost identical expressions of one another. It is never acceptable to incorporate elements of another person's work into your own work in this manner without permission, or for somebody to incorporate elements of your work without your permission.

Heidi Garfield (19:06):

So what to do if you determine that somebody is infringing your work or misusing your, your content in violation of an applicable license. In the event you believe your content has been misused, you must give notice to and receive Shutterstock's prior written consent before you take any action. While Shutterstock takes commercially reasonable steps to ensure that the rights of all of our contributors are not violated by customers or other third parties, Shutterstock does not have an obligation to pursue any action against an alleged infringer.

Heidi Garfield (19:37):

However, we do ask that you would come to us first and provide us information that we can use to investigate any claim. Specifically, to expedite resolution and potential misuse, we ask you to contact us. You can contact our compliance team at compliance@shutterstock.com, provide the Shutterstock image ID numbers and the image that you believe are being misused, the website or location of the content where you believe the content - - the images are being misused and any other information you possess which leads you to believe that the image was licensed from Shutterstock as opposed to another stock website or agency.

Heidi Garfield (20:09):

You may be wondering why am I obligated to go to Shutterstock first when it's my content and my rights that are being violated? The requirement that you bring potential issues to Shutterstock serves your interests. It serves Shutterstock's interests, and it serves the interests of our customers.

Heidi Garfield (20:26):

First, Shutterstock has access to information about customers and licenses that will lead to a more efficient and seamless investigation, meaning a faster resolution for you. It is often the case that we can look into a potential issue and quickly determine how to fix it before you on your own would even be able to find the, to find the applicable party.

Heidi Garfield (20:45):

Second, Shutterstock's involvement in resolving potential issues is more likely to facilitate a seamless and easy resolution. For example, if you believe that your content has been incorporated into merchandise in violation of a standard license, Shutterstock may be able to quickly reach out to the customer at issue and put the appropriate license in place.

Heidi Garfield (21:06):

Not only does this resolve the issue for you and mean that you quickly get the higher payout to which you're entitled, but it likely resolves a potential and unknown issue for our community of contributors, meaning that everybody would get the right royalty. Third, as you can no doubt imagine, it can be a negative customer experience for our customers to get demands or complaints directly from contributors.

Heidi Garfield (21:30):

Moreover, it's a negative experience for you, our contributor, to feel as if you're alone in this fight to protect your content. Shutterstock has an entire IP compliance team that regularly investigates potential issues and helps our contributors to find resolution. In the event that Shutterstock cannot help you, for example, if your non-exclusive content is licensed through other agencies and we cannot determine the misuse at issue started with a Shutterstock customer, we will let you know so that you can undertake your own investigation and seek resolution directly.

Heidi Garfield (22:05):

So let's discuss license misuse in some more detail and how you can best investigate it to help yourself and help Shutterstock reach resolution. License misuse can occur in a variety of ways. On one end of the spectrum might be misuse such as using content at a resolution that isn't permissible. At the other end of the spectrum misuse can be something as egregious as offering your content for download without your permission, or misrepresenting the copyright owner of such content.

Heidi Garfield (22:31):

You may use the date the content was first used or displayed to narrow down potential licenses when you identify misuse. For content being used on the internet, look for the approximate post date, or use a service such as the Way Back Machine to determine the first date the image was used or displayed. From there, you may be able to narrow the list of sources which may have issued the license to the content.

Heidi Garfield (22:51):

Again, if you think that the license was purchased from Shutterstock, you must come to Shutterstock first and you can reach us at compliance@shutterstock.com. We take license misuse very seriously, and we investigate every claim that is brought to our attention. We will investigate whether the user is a Shutterstock customer and take further action as deemed appropriate.

Heidi Garfield (23:13):

What are the potential claims that you or somebody else might be able to bring when you feel that your content is being misused by a third party? Among other potential claims, the most common claims to arise out of image misuse include breach of contract and copyright infringement. A breach of contract claim would arise from use of an image beyond the scope of the applicable license or contract.

Heidi Garfield (23:34):

This claim can be made by the parties to the contract. Meaning for example, Shutterstock would be in a position to make a claim against a customer using an image beyond the scope of the license, for example, in breach of a standard or enhanced license. You, the content owner would not be able to bring that claim for breach of contract. However, you, the content owner could bring a claim for copyright infringement. This can, claim could apply to use of an image without the right or license to use it.

Heidi Garfield (24:01):

As an example, a claim for copyright infringement could potentially be made based on use of a w - - the use of a watermarked image or the use of an image by an unauthorized third party. In the event that you believe you want to make a claim against any party using your image and Shutterstock is not taking action, we do suggest that you consult your own attorney for further advice and information.

Heidi Garfield (24:23):

Before you get to the point of making a claim, whether for breach of contract or copyright infringement, we have a number of non-litigation alternatives available that can help with, quickly resolve potential issues. One excellent non-litigation option avail - - is available under the Digital Millennium Copyright Act, also known as the DMCA. The

DMCA protects service providers from being held liable for independent acts of their users.

Heidi Garfield (24:45):

A service provider is a website, internet host, or service that publishes or transmits content uploaded by users or customers. In order for service providers to benefit from DMCA immunity, they need to promptly take down content after receiving notice of a demand, of a, notice of claimed infringement. Some examples of service providers with which you might be familiar include social media sites such as Facebook, Twitter, and Pinterest. Other examples include sites where content may be uploaded such as YouTube or sharing sites such as rapidgator.net.

Heidi Garfield (25:19):

Some online marketplaces are also considered service providers. Examples of these might include eBay, Amazon, and Etsy. If you've identified use of watermarked content and share it with Shutterstock, or if we identify it directly, and remember that we are always investigating potential issues, Shutterstock will likely send a DMCA take down notice on your behalf.

Heidi Garfield (25:40):

In the event that you send a DMCA notice directly, please be aware that you must be sure that the use is unlicensed before sending a notice, and you must comply with the very strict requirements of a proper takedown notice. For more information on the requirements for DMCA notice - - notice, please visit the website for the copyright office at copyright.gov/onlinesp.

Heidi Garfield (26:04):

So for non service providers, you have options as well. The not - - the DMCA does not apply to non service providers, and a non-litigation for those people or entities is to send a takedown demand directly to a website owner. You may be able to find information for a website owner on the website itself, or you can conduct a Whois search in order to find contact information for the registrant of the site's domain name.

Heidi Garfield (26:27):

If the owner of the website does not comply with your request, your attorney can advise you on possible next steps. If you believe that elements of your work are being copied by another Shutterstock contributor without your permission, you should first try to contact that contributor and resolve the manner directly.

Heidi Garfield (26:43):

If you cannot reach a resolution, again, you can reach out to Shutterstock at any time for additional help by contacting us at compliance@shutterstock.com with the following

information: your Shutterstock image ID number for the image allegedly infringing your work, information about the images that are original, for example, the Shutterstock ID number, or if that content is not available on Shutterstock, the direct links to the images at issue and any other information that leads you to believe that the allegedly infringing image is copying your work.

Heidi Garfield (27:10):

Please be specific about the elements at issue. If you recall from the example that we previously discussed with the owls, remember that the images themselves were distinct. It was this smaller part of the image, the two owls that were copied. So it's important to always identify the elements at issue. Shutterstock investigates every claim that we receive, and we take action as deemed appropriate. Now we'll take any questions that you have. It looks like we don't have any questions so thank you very much for your time and participation today.